U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF P-S-H- INC.

DATE: FEB. 28, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a residential facility for the elderly, seeks to employ the Beneficiary as a commercial marketing specialist. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish, as required, that the Petitioner had the continuing ability to pay the proffered wage from the petition's priority date onward. On appeal, the Petitioner asserts that it has sufficient income and assets to pay the proffered wage.

Upon *de novo* review, we will dismiss the appeal.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL).[1] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of U.S. workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national applies for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is January 4, 2016. *See* 8 C.F.R. § 204.5(d).

II. ABILITY TO PAY THE PROFFERED WAGE

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The proffered wage is $174,658 per year. In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it had sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and the wages paid, if any. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage.[2]

The record does not demonstrate that the Petitioner has paid the Beneficiary any wages in 2016. Further, the Petitioner did not submit regulatory-prescribed evidence of its ability to pay the proffered wage in 2016.[3] On appeal, it states that its 2016 tax return will be available by September 15, 2017. As of the date of this decision, we have not received the Petitioner's 2016 federal tax return.

We may consider evidence of a petitioner's ability to pay beyond its net income and net current assets, including such factors as: the number of years it has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; whether a beneficiary will replace a current employee or outsourced service; or other evidence of its ability to pay a proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-615 (Reg'l Comm'r 1967).

In this case, the record indicates that the Petitioner was established in 2009, and the Petitioner claims to employ nine employees. Unlike in *Sonegawa*, the record here does not the growth of the Petitioner's business; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; and whether a beneficiary will replace a current employee or outsourced

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[2] Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, -- F. Supp. 3d --, 2015 WL 3634497, *5 (S.D. Cal. 2015); *Rizvi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, -- Fed. Appx. --, 2015 WL 5711445, *1 (5th Cir. Sept. 30, 2015).

[3] The record contains the Petitioner's 2015 federal tax return, which does not establish its ability to pay the proffered wage.

service. Moreover, the lack of any regulatory required evidence of the Petitioner's ability to pay from the priority date onward severely limits out ability to analyze the totality of its circumstances. Thus, assessing the totality of circumstances in this individual case, the record does not establish the Petitioner's continuing ability to pay the proffered wage pursuant to *Sonegawa*.[4]

The Petitioner has not established its continuing ability to pay the proffered wage from the petition's priority date onward.

III. THE BENEFICIARY'S EXPERIENCE

Although not addressed by the Director in his decision, the Petitioner has not established that the Beneficiary possessed the experience required by the labor certification as of the priority date.

A beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). In this case, the labor certification requires a bachelor's degree and five years of experience in the offered job, or a master's degree and two years of experience.[5]

The Beneficiary seeks to qualify on the basis of a bachelor's degree and five years of experience in the job offered. On the labor certification the Beneficiary claims to qualify for the offered position position based on experience as a sales officer with , in the Philippines from April 1, 2011, to December 15, 2012; as a sales/marketing manager with in the Philippines from November 15, 2008, to March 15, 2011; as a business development manager (sales) with in the Philippines from March 19, 2007, to November 1, 2008; as a sales manager with in the Philippines from October 1, 2005, to March 31, 2006; as a business development manager (sales) with in the Philippines from June 1, 2002, September 30, 2004; and as an airline cargo supervisor with in the Philippines from September 1, 1983, to August 30, 1998.

Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. *See* 8 C.F.R. § 204.5(g)(1). In this case, the evidence is sufficient to demonstrate the Beneficiary's claimed experience with and for a total of four years and eight months of qualifying experience.

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[4] The Petitioner's California residential care facility license limits its capacity to six patients. It is not clear why the Petitioner requires the full-time services of a commercial marketing specialist to "manage all marketing, advertising, and promotional staff activities" and to "augment" its sales when it is limited to six patients. The Petitioner must resolve this ambiguity in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

[5] The Beneficiary has the required bachelor's degree.

However, the evidence concerning the Beneficiary's other claimed employment is deficient. Specifically, the letters from [redacted] and [redacted] do not give a specific description of the duties performed by the Beneficiary as required by 8 C.F.R. § 204.5(g)(1). Thus, the letters are not sufficient to establish that the Beneficiary gained qualifying experience as a commercial marketing specialist. Additionally, no employment experience letter was submitted regarding the claimed employment with [redacted]

Thus, the Petitioner has established the Beneficiary's four years and eight months of qualifying employment experience, which is less than the five years required by the labor certification. The Petitioner has not established that the Beneficiary possessed the experience required by the labor certification as of the priority date.

IV. CONCLUSION

The Petitioner did not establish its continuing ability to pay the proffered wage because it did not submit regulatory-prescribed evidence of its ability to pay the proffered wage from the priority onward. Further, the Petitioner did not establish that the Beneficiary possesses the required experience for the offered job.

ORDER: The appeal is dismissed.

Cite as *Matter of P-S-H- Inc.*, ID# 1052639 (AAO Feb. 28, 2018)